86-438

Supreme Court, U.S.
FILED
AUG 25 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RONALD M. ROBERTS

PETITIONER,

V.

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX

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Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Appeal
	)	
DEPARTMENT OF TRANSPORTATION, FAA	)	No. 85-1968
Respondent.	)	

DECIDED: April 23, 1986

Before BALDWIN, NIES and ARCHER, Circuit Judges.

NIES, Circuit Judge.

DECISION

Ronald M. Roberts petitions from the final decision of the Merit Systems Protection Board (board) in Case No.

AT315H8310757, which sustained his removal from the position of Air Traffic Control Specialist at the Fulton County Airport, Atlanta, Georgia. That removal was based on a charge of failure to complete training requirements, which resulted from three instances of Mr. Roberts' failure to report for scheduled training. We affirm.

DISCUSSION

In the opinion accompanying its order denying Mr. Roberts' petition for review, the full board considered Mr. Roberts' argument that closing his hearing because of the conduct of his representative resulted in a denial of due process. The hearing was closed after repeated warnings that such action would result and a decision made on the

record if misconduct continued. For the reasons stated in the board's opinion, we agree that no violation of Mr. Roberts' due process rights has occurred. That being the sole argument raised on appeal, we affirm the final decision of the board on the basis of the opinions of the presiding official and of the board. No error has been shown which would allow us to disturb that decision. 5 U.S.C. § 7703(c) (1982); see Hayes v. Department of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

85-1968

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD M. ROBERTS v. FEDERAL AVIATION ADMINISTRATION	DOCKET NUMBER AT315H8310757 DATE: SEPT. 11, 1984

OPINION AND ORDER

Appellant was removed from his position of air traffic control specialist by the Federal Aviation Administration (agency). The action was based on a charge of failure to complete training requirements arising from appellant's failure to report for scheduled training at the Federal Aviation Administration Academy, Oklahoma City, Oklahoma. He appealed the agency action to the Board's Atlanta Regional Office. On appeal the presiding official terminated the hearing during the presentation of

appellant's case due to disruptive conduct of his attorney. Her decision affirmed the agency action, finding that the agency's reasons for appellant's removal were established by a preponderance of the evidence, and that the action was taken for such cause as would promote the efficiency of the service. In his petition for review appellant does not challenge the factual findings of the presiding official. Rather, he asserts that he was denied due process when the hearing was terminated without just cause and asks that the case be remanded for a rehearing.

The record reflects that appellant's attorney made an opening statement at the hearing, presented witnesses and cross-examined the agency's witnesses. The Board has reviewed the entire hearing

records and notes that appellant's counsel consistently ignored the presiding official's instructions as to the scope of the evidence to be presented, and agrees with her characterization of his behavior as disruptive. Presiding officials have wide discretion in controlling the course of a hearing under the Board's regulations at 5 C.F.R. § 1201.41(b), and in this case the hearing was terminated only after repeated warnings to appellant's counsel about the consequences of his behavior. Appellant does not contest the factual findings of the presiding official, and there is no evidence to suggest that appellant was not accorded a fair hearing with

regard to the merits of his case. Appellant has not shown how the presiding official's exercise of her discretion to terminate the hearing constitutes an abuse of her discretion.*/ The Board,

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*/ See Blanton v. Department of Transportation, MSPB Docket No. DC075281F0904 at 2 (July 6, 1983), appellant deemed responsible for actions of representative; no abuse of discretion in closing hearing based on representative's disruptive conduct). Additionally, we note that five months passed from the date of the hearing until the initial decision was issued, without any objection being voiced by appellant to the presiding official's action. In this regard, see Abarr v. Department of Transportation, MSPB Docket No. CH075281F0833 (September 19, 1983), holding that failure to raise an issue to the presiding official concerning his processing of the case may result in waiver of that issue.

therefore, finds that appellant has failed to show any prejudicial error in the presiding official's handling of the hearing. Karapinka v. Department of Energy, 6 MSPB 114 (1981).

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C., 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD

/s/ Stephen E. Manrose
Acting Clerk

Washington, D. C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:

RONALD M. ROBERTS, Appellant, v. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Agency.	DECISION NUMBER AT315H8310757 DATE: January 6, 1984

INTRODUCTION

By petition for appeal filed May 26, 1983, Ronald M. Roberts (appellant) appealed from the action of the U.S. Department of Transportation, Federal Aviation Administration, Air Traffic Division, Air Traffic Control Tower, Fulton County Airport, Atlanta, Georgia (agency), removing him from the position of Air Traffic Control Specialist, GS-7,

effective May 6, 1983. The action was based on a charge of failure to complete training requirements.

The appellant seeks reinstatement to his position. In his petition he raised a claim of discrimination which upon close review appears to be a claim of jealousy because of his financial position. The appellant requested a hearing which was held on August 1, 1983, in the Atlanta Regional Office Hearing Room.[1] This decision is based on the submissions of the parties and the hearing tapes. This matter is within the jurisdiction of the Board. See 5 U.S.C. §§ 7701(a), 1205(a)(1), 7513(d) and 7511(a)(1)(A).

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1 Due to the disruptive conduct of the appellant's attorney, the hearing was terminated during the presentation of the appellant's case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Because the action was based on the provisions of subchapter II of chapter 75, title 5, United States Code, the agency has the burden of proving two elements. The first element is whether it has met its burden of supporting the reasons for the action by a preponderance of the evidence. 5 U.S.C. § 7701(c); 5 C.F.R. § 1201.56(a)(1)(ii). Secondly, the agency has the burden of showing that the action was taken for such cause as will promote the efficiency of the service, and that the penalty was appropriate. Starkey v. Department of the Air Force, 3 MSPB 377 (1980); Douglas v. Veterans Administration, 5 MSPB 313 (1981).

On the other hand, the appellant bears the burden of proof with respect to the affirmative defenses as described in 5 U.S.C. § 7701(c)(2). The preponderance of the evidence standard applies to any affirmative defense raised by the appellant. Shockro v. Federal Communications Commission, 5 MSPB 181 (1981); In re Robert J. Frazier, Jr., 1 MSPB 159 (1979).

If an appellant can prove an affirmative defense, the action on appeal cannot be sustained. 5 U.S.C. § 7701(c)(2).

Appellant was originally hired by the agency in 1973 and completed the service requirement for career tenure on May 14, 1976.[2]

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2 See Tab 9, Agency Response.

By letter dated March 22, 1983, [3] Ray G. Fitzpatrick, Air Traffic Manager, Air Traffic Control Tower (ATCT), Fulton County Airport, proposed to remove the appellant based on failure to complete the training requirements of his position. Specifically, the notice set out three instances of the appellant's failure to report for scheduled training at the Federal Aviation Administration Academy, Oklahoma City, Oklahoma. The notice also referenced the appellant's February 1, 1983 resignation effective March 11, 1983, which was withdrawn on March 4, 1983.

The appellant responded to the notice of proposed removal in writing on

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3 See Tab 10, Agency Response.

April 11, 1983. In his response, he challenged the requirements for the training. Further, he set out the circumstances which resulted in his admitted failure to attend the most recently scheduled training session. After consideration of the appellant's reply, Mr. Fitzpatrick sustained the proposal and removed the appellant effective May 6, 1983. The notice of removal set out the appellant's right of appeal to this Board and this appeal followed.

In support of its action, at the hearing, the agency presented documentary and testamentary evidence. Essentially, the witnesses related that the agency's

training program mandated initial training at the Federal Aviation Administration Academy. Further, the record shows that the appellant was given three opportunities to complete the training and each time he failed to attend the scheduled course at the FAA Academy. The appellant admitted that he did not take the training as scheduled.[4] Instead he cites personal problems as the reason why his training was rescheduled on two occasions. He noted in documents submitted in connection with his appeal the reason why he failed to attend the third scheduled

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4 An appellant's admission may serve to meet the agency's burden of proof. See McClaskey v. Department of Energy, MSPB Docket No. SE07528110094 (August 16, 1982); Mascol v. Department of the Navy, 7 MSPB 408 (1981).

session. Specifically, he felt that he and his supervisor (Fitzpatrick) had a personality conflict which would result in the Academy's instructors precipitating his failure to successfully complete the course. In support of that contention, the appellant presented several witnesses who testified regarding their perception of the relationship between the appellant and his supervisor. These witnesses painted a picture of a deteriorating relationship between the two men. The evidence presented by the appellant, however, failed to establish that the difficulty between the two men was the result of Mr. Fitzpatrick's attempting to harrass

the appellant because of his outside business interest.[5] I do not find that the appellant has shown any action on the part of his supervisor which would have caused him to fail to attend regularly scheduled training.

In light of the appellant's admission that he failed to attend scheduled training and the evidence of record, I find that the agency has proven the basis for the removal action by the requisite preponderance of the evidence.

As noted above, the appellant raised the issue of discrimination in his

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[5] The record is replete with references to the appellant's horse farm.

petition. At the hearing, he did not present any evidence to support that claim. I therefore consider appellant's claim of discrimination abandoned.

I will now turn to the question of whether there is a causal connection between the sustained charge and the efficiency of the service and, further, whether the penalty imposed was reasonable and did not constitute an abuse of discretion.

Aside from any evidence offered by an agency concerning the nexus question, there is nevertheless some conduct and there are some reasons with respect to which the nexus is obvious on the face of the facts. Gregory v. Hampton, 510 F.2d 1222 (D.C. Cir. 1974). Prima

facie nexus has been found to exist when the conduct or activity resulting in discipline pertains directly to the ability of the employee to perform his duties and/or the ability of the agency to properly carry out its mission; in other words, where the conduct is job related. The nexus in such instances may be presumed because it is readily apparent. Blackford v. Department of the Navy, MSPB Dkt. No. PH7528010412 (November 24, 1981).

Prima facie nexus is applicable in the present appeal. The record amply justifies the agency's position that progressive training is mandatory for an employee in the appellant's position.

The position of Air Traffic Control Specialist requires highly technical skills which must be developed pursuant to a prescribed training program. Clearly, appellant's refusal to obey an order to complete required training undermines the mission of the agency. I find that the agency has shown the requisite nexus.

I must now consider whether the agency's decision to remove the appellant based on the sustained charge was appropriate pursuant to the criteria set out in Douglas, supra. As noted above, the appellant raised the issue of disparate treatment. When an appellant raises an allegation of disparate treatment in comparison with other specified employees, the agency must prove legitimate reasons for different

treatment of the different employees by a preponderance of the evidence. Woody v. General Services Administration, 6 MSPB 410 (1981). The appellant contends that other agency employees were not required to complete training before moving to the next step or grade. In addressing that issue, the agency presented evidence that during emergency situations, i.e., the Air Traffic Controller strike, on-the-job training was substituted for academy training. Given the seriousness of the agency's mission, I find it reasonable that it could make exceptions during emergencies. The appellant has not shown that his academy training was mandated during a national crisis. Therefore, I find that he

had failed to show disparate treatment.

In this case, it cannot be said that the penalty was outside the bounds of reasonableness. In view of the appellant's consistent refusal to complete training which was scheduled at least three weeks prior to commencement, I conclude that the agency's selection of the penalty of removal was within the "tolerable limits of reasonableness" required by Douglas, 5 MSPB at 314. I therefore conclude that the agency has carried all of its burdens and that the appellant's removal was for such cause as will promote the efficiency of the service.

DECISION

The agency's action in removing the appellant is hereby AFFIRMED.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 10, 1984 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Any appellant adversely affected or aggrieved by the Board's final decision

may obtain judicial review by filing a petition with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439.

Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(B)(1).[6]

FOR THE BOARD:

/s/ Henrietta E. Turnquest

Presiding Official

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[6] As modified by § 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. § 1295(a)(9).

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS, Petitioner,	)	Appeal
v.	)	No. 85-1968
DEPARTMENT OF TRANSPORTATION, FAA, Respondent.	)	Dated: April 23, 1986

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO(S). AT315H8310757

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

Date: 4-23-86 /s/ Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: June 4, 1986

COSTS AGAINST PETITIONER:

Printing.....$37.60

Total.....$37.60

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS, Petitioner, v. DEPARTMENT OF TRANSPORTATION, FAA, Respondent.	)	Appeal No. 85-1968 Dated: May 28, 1986

Before BALDWIN, NIES, and ARCHER, Circuit Judges.

O R D E R

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Dated: May 28, 1986

/s/ Francis X. Gindhart
Clerk

(By Diana Frye, Chief Deputy Clerk)

cc: Mr. Robert John Genins, Jr.
Mr. Stuart James, DOJ

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

RONALD M. ROBERTS, Petitioner,	)	Appeal
v.	)	No. 85-1968
DEPARTMENT OF TRANSPORTATION, FAA, Respondent.	)	Dated: June 9, 1986

Before BALDWIN, NIES, and ARCHER, Circuit Judges.

O R D E R

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT

June 9, 1986 /s/ Francis X. Gindhart
Date Clerk

cc: Mr. Robert John Genins, Jr.
Mr. Stuart James, DOJ

CERTIFICATE OF SERVICE

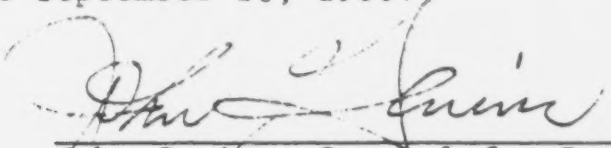
I do hereby certify that I have served the only party required to be served herein, Respondent, by my depositing in a United States mailbox, three envelopes which each contained three copies of the within Appendix and had affixed adequate first-class postage thereto, addressed to:

SOLICITOR GENERAL,
Department of Justice,
Washington, D.C., 20530

STUART JAMES, ESQ.,
Civil Division,
U.S. Department of Justice,
Room 711, 550 11th Street,
Washington, D.C., 20530

MARY JONES, ESQ.,
Office of General Counsel,
Federal Aviation
Administration,
Washington, D.C., 20590.

This September 16, 1986.



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